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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 13

UNITED GAS PUBLIC SERVICE COMPANY, *Appellant*,

v.

THE STATE OF TEXAS, ET AL, *Appellees*.

Appeal from the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.

APPELLEES' SUPPLEMENTAL BRIEF.

V. (See pp. 18, 44-47, Appellees' Original Brief).
VI. (See pp. 19, 44-47, Appellees' Original Brief).
VII. (See pp. 19-20, 44-47, Appellees' Original Brief).

Appellant argues that the Court of Civil Appeals has denied it the independent judicial review, as to the facts, claimed by it to be required by due process; and that such Court has placed upon the Company an impossible burden, ignored and refused to consider its evidence, foreclosed its mind against the Company in advance, and accepted unquestioningly all evidence of Appellees. As evidence of

these claims Appellant cites the opinion of the Court of Civil Appeals.

We also invite this Court's most careful scrutiny of that opinion. (R. I, 410-428, 89 S. W. (2d) 1094). We ask the Court especially to note how often, in the opinion, the Court of Civil Appeals specifically adverts to, discusses, analyzes and reviews, Appellant's evidence and contentions. R. I, 414, 415, 416, 417, 420, 421, 422, 423, 425.

That the Court of Civil Appeals did exercise its independent judicial judgment as to the facts in this case is also perfectly clear from the circumstance that the Court (R. I, 423-424) cited its own previous discussion and holding, as to the scope of judicial review, in *State of Texas* v. *Lone Star Gas Company*, 86 S. W. (2d) 494, 498-500; where it specifically pointed out and discussed at length the clear distinction between the type of judicial review required in the case of orders not involving claimed confiscation and those involving such question; and where it is expressly held that in the case of claimed confiscation the court is required, in view of the *Ben Avon Borough case* and others, to accord the complaining party a *de novo* or independent judicial review as to the facts as well as the law. This it then proceeded to do in the present case.

XXVI-A, "Rate Base In General": (See pp. 87-92, Appellees' Original Brief):

Appellant also points out that the Court of Civil Appeals adopted, as the rate base in some of its computations, the sum of $700,000 instead of the $885,000 fair value found by the Commission; and from this circumstance alone the Company jumps to the conclusion—absolutely unwarranted by anything appearing either in the court's opinion or in the entire record—that this $700,000 represents, in round numbers, the depreciated reproduction cost new estimate of $698,047 of the Commission's witness Elrod (R. I, 330) as of December 31, 1933, before the District Court, which excluded the Pescadito-Jennings transmission line and the west Jennings gathering system.

We point out that it is perfectly plain that what the Court of Civil Appeals was referring to was, not the reproduction cost new estimate of Elrod, but the statement as to historical cost in the Commission's opinion. At R. I, 15, the Commission said:

> "In addition, the City adduced evidence showing the depreciated historical cost of the properties as of July 31, 1932, to be $709,991.23."

This amount, of course, was approximated by the Commission from a study of the City's historical cost exhibit (R. II, 1374-A) covering the whole of the properties in the Laredo area.

The Court of Civil Appeals simply said (R. I, 414-415):

> "There was also evidence *before both the trial court and the Commission,* which tended to show the fair value of appellant's property to be about $700,000 . . . "

and nothing whatever is said to indicate that it based this figure upon Elrod's estimate. On the contrary, the conclusion is inescapable that it referred to the Commission's historical cost estimate aforesaid; for the Court could not have been referring to Elrod's reproduction cost new estimate of $698,047—that estimate was not before the Commission at all. The lowest reproduction cost new estimate before the Commission was Elrod's figure of $810,698 (R. I, 15, 208). The historical cost exhibit (R. II, 1374-A) was before both the Commission and District Court, and therefore satisfied the essential requirements of the above-quoted language of the Court of Civil Appeals; and, of course, the Commission's above-quoted estimate of $709,991.23 as historical cost was likewise before the reviewing court.

XXVI-D, 5. (See pp. 39-40, 108-110, Appellees' Original Brief):

On the estoppel of the Company to urge the claimed loss of the "non-recurring" revenues from Central Power &

Light Co., and Motor Fuel Products Company, because of its failure to point out in any manner, before the Commission, the claimed permanent loss of these accounts, although such claimed losses were shown plainly to have been well known to the Company long before the Commission's hearings began:

The Company claims (see its Supplemental Brief, p. 11) that the Commission could and should have known of the claimed permanent loss of these two accounts, because the total decline in revenues, shown in Exhibit L (R. I, 218) was plainly apparent to anyone examining it. It is true that such exhibit, and the testimony generally, before the Commission, did show a decline in total revenues over the four-year operating period presented by the City before the Commission. But there was nothing, in the face of the said exhibit itself or in the Commission record otherwise, to put the Commission upon notice, (or even upon suspicion), that the decline in total revenues was in whole or in substantial part due to any claimed permanent loss of these two particular large industrial accounts or any other accounts; and in the condition of the record the Commission would naturally have supposed that the decline was due simply to a general falling off of business during the depression and was therefore only temporary.

On the distinction between introducing before the reviewing court evidence which has newly developed, or been newly discovered, since the close of the Commission record, on the one hand, and evidence which, on the other hand, was known to the complaining party prior to the Commission hearing, and not introduced by it at such hearing but deliberately withheld and introduced by it for the first time in the reviewing court, see *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 54, 80 L. Ed. 1033. And on the impropriety of such conduct generally, see also concurring opinion of Justices Brandeis, Stone, Roberts and Cardozo, in *B. & O. R. Co.* v. *United States,* 298 U. S. 349, 392, 80 L. Ed. 1209.

XIX. (See pp. 28, 63-66, Appellees' Original Brief):

Upon the question of refunds allegedly infringing the due process clause:

See *Central Kentucky Co.* v. *Commission*, 290 U. S. 264, 275, 78 L. Ed. 307, where this Court, on reversing because of the lower court's unauthorized attempt to fix a new rate, ordered accumulated refunds to be held in custody of an agent of the Commission, for disposition by it on the ordered rehearing, for a period of several years. This shows plainly that there is nothing about impounding and ordering of past refunds which is incompatible with due process.

XXVI-B, 8. (See pp. 36, 101-105, Appellees' Original Brief):

Please add to footnote 29, page 104, of our original brief, the case of *Lindheimer* v. *Ill. Bell Tel. Co.*, 292 U. S. 151, 169, 78 L. Ed. 1182, 1194.

XXVI-B, "Operating Expenses in General": (See pp. 107-108, Appellees' Original Brief):

As pointed out by this Court in *Lindheimer* v. *Ill. Bell Tel. Co.*, 292 U. S. 151, 164, 78 L. Ed. 1182, 1191, the items of questioned operating expense are especially important, because, dollar for dollar, they exercise a much greater effect upon the rate structure than do property items entering into the rate base.

Respectfully submitted,

WILLIAM MCCRAW,
Attorney General of Texas,

ALFRED M. SCOTT,
Assistant Attorney General of Texas,

EDWARD H. LANGE,
City Attorney, City of Laredo,
Attorneys for Appellees.